

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Request for Review by the
Milwaukee Public Schools of Decisions of the
Universal Service Administrative Company

Schools and Libraries Universal Service Support
Mechanism

CC Docket No. 02-6

Milwaukee Public Schools

Billed Entity Number: 132882

Funding Request Numbers: 1042817

471 Application Numbers: 360352

REQUEST FOR REVIEW

The Milwaukee Public Schools (“Milwaukee”), pursuant to Section 54.719(c) of the Commission’s rules, hereby submits this Request for Review of a decision of the Universal Service Administrative Company, Schools and Libraries Division (“USAC” or “SLD”), denying Milwaukee’s request for funding for internal connections service for Funding Year Six (academic year 2003-2004). USAC improperly denied Milwaukee’s funding request based on factually incorrect conclusion that a contract was not in place between Milwaukee and the service provider covering these internal connections services during the relevant time period.¹ With this Request for Review, Milwaukee asks the Commission to overturn this decision and remand to USAC with instructions to fund the requests for payment.

¹ Letter from USAC/SLD to James E. Davis, Director of Technology, Milwaukee Public Schools, “Administrator’s Decision on Appeal – Funding Year 2003-2004,” Funding Request No. 1042817, 471 Application No. 360352 (dated March 3, 2005) (“NetWare Decision on Appeal”). Attached as Exhibit 1.

BACKGROUND

USAC denied Milwaukee's funding applications based on a misunderstanding and mischaracterization of Milwaukee's contracting decisions for NetWare, a form of network operating system software required as a core component of the functioning of Milwaukee's local area network, which is eligible for funding as an internal connections-related service.

Consistent with Commission rules governing the competitive bidding process for the E-rate program, Milwaukee filed a Form 470, posting a request for proposals ("RFP") for NetWare service, a Novell-manufactured network operating system, on the USAC website on January 7, 2003.² Milwaukee received two bids to provide the NetWare service. After waiting the requisite 28 days, Milwaukee accepted the bid of Inacom Systems, Inc. ("Inacom"), notifying Inacom of its acceptance soon thereafter. Milwaukee entered into a one-year agreement with Inacom, running from July 1, 2003 to June 30, 2004 for NetWare service. After accepting Inacom's bid Milwaukee submitted its Form 471 request for E-rate funding support for the contracted services on February 6, 2003.³ On September 9, 2003, USAC denied this request based on the fact that over 30% of the funding request included unsubstantiated student licensing agreement charges that are ineligible for funding reimbursement according to Commission rules.⁴

² Milwaukee Public Schools, Form 470 (dated January 7, 2003). Attached as Exhibit 2.

³ Milwaukee Public Schools, Form 471 (dated February 6, 2003). Attached as Exhibit 3.

⁴ 47 C.F.R. § 54.504 *et seq.* Funding Commitment Report, Funding Request No. 1042817, Form 471 Application No. 360352 (dated September 9, 2003). Attached as Exhibit 4.

In its initial appeal, dated October 3, 2003,⁵ Milwaukee referenced an earlier communication, dated August 5, 2003,⁶ which separated out the eligible and ineligible charges, and reiterated a funding request solely for the eligible charges.⁷ This revision of the request no longer violated the Commission's "30% rule."

In its response, dated March 3, 2005, USAC approved Milwaukee's appeal on the previous ground – that is, it accepted the revisions that Milwaukee had made to its request pursuant to the Commission's "30% rule," but then denied Milwaukee's funding request on the ground that there was no legally binding agreement in place when Milwaukee filed its Form 471 funding request.

In support of this conclusion, USAC referred to a May 12, 2003 communication in which Milwaukee stated that it had not awarded any contracts to the recommended vendors, and that contracts would be presented to the Milwaukee School Board. USAC also relied on correspondence dated July 23, 2003, referring to the Milwaukee School Board's approval of a request to enter into contracts. USAC also pointed to an email from Milwaukee to vendors, dated March 24, 2003, indicating that a contract award was based on a funding

⁵ Letter of Appeal from James Davis, Director of Technology, Milwaukee Public Schools to School and Libraries Division, USAC, dated October 3, 2003. Attached as Exhibit 5.

⁶ Letter from James E. Davis, Director of Technology, Milwaukee Public Schools, to Ms. Giancamillo, School and Libraries Division, USAC, dated August 5, 2003. Attached as Exhibit 6.

⁷ It must be noted that Milwaukee did not address any issues related to concerns about whether it had a binding agreement in place at the time it filed its Form 471 because these issues were never raised with Milwaukee by USAC. See Milwaukee Public Schools Request for Review of Decisions of the Universal Service Administrative Co., CC Docket No. 02-6 (filed April 15, 2005) ("Milwaukee Public Schools Request for Review") at 9 n. 13. It was Milwaukee's belief that USAC's concerns about the existence of a legally binding agreement were limited to its request for funding for its POTS service. There was never an indication that Milwaukee risked being denied funding on the present ground.

commitment of the SLD and approval by the Milwaukee School Board. Finally, USAC referred a July 25, 2003 correspondence from Milwaukee – in response to a request to explain how agreements were secured with vendors at the time of the filing of the Forms 471 – which again referenced the July 22 School Board approval as the basis of the contract formation.⁸

ARGUMENT

USAC ERRONEOUSLY DENIED THE FUNDING FOR NETWARE SERVICE BECAUSE IT CAME TO THE MISTAKEN CONCLUSION THAT MILWAUKEE HAD NOT ENTERED INTO CONTRACTS WITH A SERVICE PROVIDER WHEN THE FORM 471 WAS FILED

The sole basis for this appeal is that USAC incorrectly concluded that Milwaukee did not have a legally binding agreement with Inacom at the time that it filed its Form 471 request for funding for NetWare service. USAC's requirement that a signed contract be in place is contrary to Wisconsin contract law, and contrary to USAC's previous decision involving Milwaukee's application for local exchange telecommunications service (plain old telephone service, or "POTS"). Pursuant to Wisconsin law of public contracts, Milwaukee had a legally binding agreement with Inacom for NetWare service.

In its March 3, 2003 response to Milwaukee's appeal of its NetWare service funding denial, USAC reversed its earlier decision that Milwaukee's request was ineligible because it violated the "30% rule;" however it again denied Milwaukee's request for funding on the ground that there was no legally binding agreement in place when Milwaukee filed its Form 471 request. As discussed

⁸ Petitioner is not in possession of these communications. A call was placed to USAC to obtain a copy of these documents, but they could not be located.

above, USAC based this conclusion on multiple correspondence that it received from Milwaukee, which gave USAC the impression that Milwaukee was without a legally binding agreement when the Form 471 was filed. However, USAC's understanding of this set of exchanges mischaracterizes the actual legal obligations that existed between Milwaukee and Inacom by February 6, 2003, when the Form 471 request was filed with USAC.

The present situation is identical to USAC's previous conclusion that Milwaukee had failed to secure a contract with SBC prior to its filing of its Form 471 request for POTS service. However, Milwaukee explained that Wisconsin public contract law supports the conclusion that Milwaukee had a legally binding agreement with its POTS service provider at the time it filed its Form 471, USAC accepted that Milwaukee had a legally binding agreement when it filed its Form 471 for POTS service.

Milwaukee's argument, in this context, is no different. Pursuant to Wisconsin public contract law, a contract is formed once a public entity accepts a competitive bid, even though no formal written notice has been sent or the formal contract executed. This view was established in the public contracting context over 70 years ago in *L.G. Arnold, Inc. v. Hudson*, 254 N.W. 108 (Wisc. 1934), and was reaffirmed in *Nelson, Inc. v. Sewerage Commission of Milwaukee*, 241 N.W.2d 390 (Wisc. 1976).

The Milwaukee City Attorney, in a letter to USAC regarding its POTS funding denial, writes: ". . . Wisconsin is among those states which hold that acceptance of a valid bid by the proper municipal authorities, where all legal requirements are observed, constitutes a binding contract. Moreover, a contract

may come into existence upon acceptance of a bid, even though as to certain formalities or details there has been a defective compliance with legal formalities or requirements.”⁹

This case represents an identical situation. Milwaukee issued an RFP, and accepted bids from various vendors for the provision of NetWare service. Consistent with Wisconsin public contract law, its acceptance of Inacom’s bid and its notification of such acceptance created a legally binding agreement, the statements made in the referenced correspondence, notwithstanding.¹⁰ The fact that Milwaukee’s Board retroactively voted to approve the contract after the Form 471 was filed is of no legal significance given Wisconsin public contract law. This was no different from USAC’s decision that Milwaukee had a legally binding agreement for POTS service in a circumstance that was identical to this case.¹¹

⁹ Letter from Grant F. Langley and Dawn M. Boland, City of Milwaukee, Office of City Attorney to Michelle Nate, Department of Finance, Milwaukee Public Schools, dated January 27, 2004. Attached as Exhibit 7.

¹⁰ With regard to the correspondence referenced in USAC’s denial of Milwaukee’s appeal, Milwaukee’s representative was responding, or assumed that he was responding, to general questions about the existence of formal contract documents, which did not exist at the time. The responses were not intended to suggest that Milwaukee was not legally bound by the agreements that it had with Inacom as of its acceptance of its bid to provide NetWare service to Milwaukee. Indeed, that the communications between Milwaukee and USAC were at a relatively high level of generality is supported by the fact that USAC has referenced the May 12, 2003 correspondence to support its conclusion that Milwaukee had no contract in place when it filed its Form 471 requests for two separate services – NetWare and SONET.

¹¹ Letter from USAC/SLD to James E. Davis, Director of Technology, Milwaukee Public Schools, “Administrator’s Decision on Appeal – Funding Year 2003-2004,” Funding Request Number 1043797, 471 Application No. 361703 (dated February 16, 2005). Attached as Exhibit 8.

CONCLUSION

For the reasons stated above, Milwaukee respectfully requests that the Commission reverse USAC's funding denial for Milwaukee's request for NetWare internal connections service.

Respectfully submitted,

MILWAUKEE PUBLIC SCHOOLS

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*Not admitted in DC

CERTIFICATE OF SERVICE

This is to certify that, pursuant to 47 C.F.R. § 54.721(c), on May 2, 2005, a copy of the foregoing Request for Review of Milwaukee Public Schools was sent, via First Class Mail (except where noted), to the persons listed below service to:

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